

STATE OF MICHIGAN
COURT OF APPEALS

JAMES LAHOOD-SARKIS, as Next Friend of
JIMMY LAHOOD-SARKIS, ALEXIS LAHOOD-
SARKIS, JULIAN LAHOOD-SARKIS, and
ISABELLA LAHOOD-SARKIS,

UNPUBLISHED
October 11, 2011

LaHood-Sarkis-Appellant,

v

GARDELLA HOMES, INC., RAYMOND
GARDELLA, and SEAN D. GARDELLA,

No. 300078
Oakland Circuit Court
LC No. 2009-103246-CK

Defendants-Appellees.

Before: MURPHY, C.J., and TALBOT and MURRAY, JJ.

PER CURIAM.

This case involves claims for negligence, fraud, and breach of warranty brought by James LaHood-Sarkis (“LaHood-Sarkis”), as the next friend for his minor children, in connection with the construction of a house by Gardella Homes, Inc. (GHI), pursuant to a residential construction contract between GHI, as the general contractor, and James and Danielle LaHood-Sarkis (the “Lahoods”), as the property owners and purchasers of the house. LaHood-Sarkis challenges the grant of summary disposition in favor of GHI, Raymond Gardella and Sean D. Gardella (“the Gardellas”). We affirm.

I. BACKGROUND

In June 2006, GHI and the LaHoods entered into a residential construction contract for GHI to construct a residence on the LaHoods’ property. In December 2008, GHI and the LaHoods modified the contract in settlement of a dispute over the amount owed to GHI for the construction project. In August 2009, LaHood-Sarkis, as next friend for his minor children, filed this action against GHI and the Gardellas. LaHood-Sarkis alleged that faulty construction led to water damage in the house and the formation of toxic mold, which caused the children to suffer allergic reactions and respiratory problems. LaHood-Sarkis’ complaint asserted claims for negligence, breach of warranty, and fraudulent misrepresentation and sought money damages on behalf of the children. The trial court rejected LaHood-Sarkis’ argument that the children were third-party beneficiaries under the residential construction contract and granted GHI and the Gardellas’ motion for summary disposition on the grounds that LaHood-Sarkis failed to allege a

claim for relief separate and distinct from any duty under the residential construction contract, and because there was no allegation that any representations were made to the minor children. The court also denied LaHood-Sarkis' motion for reconsideration and request to amend the complaint.

II. STANDARD OF REVIEW

We review a trial court's ruling on a motion for summary disposition de novo.¹ A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone.² A written contract filed with a complaint is considered part of the pleading in an action based on the written contract.³ All well-pleaded factual allegations in the complaint are accepted as true and construed most favorably to the nonmoving party.⁴ The motion should be granted only if the claim is "so clearly unenforceable as a matter of law that no factual development could possibly justify a right to recovery."⁵ A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim based on substantively admissible evidence.⁶ The motion should be granted if the submitted evidence "fails to establish a genuine issue of material fact [and] the moving party is entitled to judgment as a matter of law."⁷

A trial court's decision denying a motion for reconsideration is reviewed for an abuse of discretion.⁸ A decision denying leave to amend the pleadings is also reviewed for an abuse of discretion.⁹ "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes."¹⁰

III. NEGLIGENCE CLAIM

LaHood-Sarkis argues that the trial court erred in determining that he failed to plead a claim for negligence against GHI because he did not establish a duty owed by GHI outside the residential construction contract. LaHood-Sarkis also argues that the minor children could pursue an action in negligence as third-party beneficiaries to that contract, and that the trial court

¹ *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006).

² *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).

³ MCR 2.113(F); *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007).

⁴ *Maiden*, 461 Mich at 119.

⁵ *Id.*

⁶ *Maiden*, 461 Mich at 120-121; MCR 2.116(G)(6).

⁷ *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 424-425; 751 NW2d 8 (2008).

⁸ *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 629; 750 NW2d 228 (2008).

⁹ *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004).

¹⁰ *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

should have allowed him to amend the complaint to add a claim for negligence based on a violation of the Single State Construction Code Act (SSCCA).¹¹

Negligence has been described as “conduct involving an unreasonable risk of harm.”¹² An essential element of a negligence action is a legal duty.¹³ “Duty is essentially a question of whether a relationship between the actor and the injured person gives rise to any legal obligation on the actor’s part for the benefit of the injured person.”¹⁴ “[I]t does not include where there is *an* obligation the nature of the obligation: the general standard of care and the specific standard of care.”¹⁵

LaHood-Sarkis pleaded that GHI “owed a duty to build the Property” under Michigan law and the residential construction contract, but did not specify what law gave rise to that duty apart from referring to the residential construction contract, which was filed with the complaint. That contract was executed by defendant GHI, as general contractor, and the LaHoods. LaHood-Sarkis did not identify any duty independent of the construction contract in his response to the summary disposition motion. Instead, LaHood-Sarkis relied solely on the children’s alleged status as third-party beneficiaries of the contract to oppose the motion. Although LaHood-Sarkis did not plead a third-party beneficiary theory in the complaint, he sought leave to amend the complaint to allege that theory.

To prevail on a claim for negligence, it is necessary that LaHood-Sarkis establish that GHI owed the minor children a duty separate and distinct from its obligations under the construction contract.¹⁶ As clarified by our Supreme Court, “a contracting party’s assumption of contractual obligations does not extinguish or limit separately existing common-law or statutory tort duties owed to noncontracting third parties in the performance of the contract.”¹⁷ The existence of a duty to a third party is made without regard to obligations in a contract.¹⁸ The operative question is whether the GHI and the Gardellas owed any legal duty to LaHood-Sarkis that would support a cause of action in tort.¹⁹ This case is distinguishable from other cases, as the trial court here did not grant summary disposition on the basis that any preexisting common-

¹¹ MCL 125.5001 *et seq.*

¹² *Moning v Alfonso*, 400 Mich 425, 433; 254 NW2d 759 (1977).

¹³ *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; ___ NW2d ___ (2011).

¹⁴ *Moning*, 400 Mich at 438-439.

¹⁵ *Id.* at 437 (emphasis in original).

¹⁶ *Fultz v Union-Commerce Assoc*, 470 Mich 460, 467; 683 NW2d 587 (2004).

¹⁷ *Loweke*, 489 Mich at 159.

¹⁸ *Id.* at 171.

¹⁹ *Id.*

law duty was extinguished by the existence of a contract.²⁰ Rather, it granted summary disposition because LaHood-Sarkis failed to argue any common-law duty that existed independent of the construction contract. This is evident from LaHood-Sarkis' reliance on the children's alleged status as third-party beneficiaries to oppose the motion for summary disposition.

Moreover, LaHood-Sarkis alleged in the complaint that GHI was the general contractor, not a subcontractor. The general rule is that, "in the absence of its own active negligence, a general contractor is not liable for the negligence of a subcontractor or a subcontractor's employee."²¹ Both the complaint and argument in opposition to the motion for summary disposition was based on GHI's contractual duties. LaHood-Sarkis did not allege or argue that GHI or its employees actually did the work that purportedly caused the water damage and mold in the house.

The trial court did not err in concluding that LaHood-Sarkis failed to allege a legal duty outside the residential construction contract. As LaHood-Sarkis did not plead facts to support a common-law duty owed to the minor children independent of the contract, he failed to state a claim for negligence.

We also conclude that LaHood-Sarkis has not established any entitlement to relief based on alleged statutory duties arising under the SSCCA. As LaHood-Sarkis first presented this argument in his motion for reconsideration, he must establish that the trial court abused its discretion in denying the motion.²² A trial court does not abuse its discretion in denying a motion for reconsideration where the motion rests on a legal theory and facts that could have been pleaded or argued before entry of the order.²³ But a trial court also has discretion to "give a party a second chance on the previously decided motion."²⁴

The trial court's decision indicates that it gave LaHood-Sarkis an opportunity to identify a legally cognizable claim, but rejected the claim that the SSCCA could be used to establish a cause of action. We uphold the trial court's decision because alleged violations of the SSCCA are insufficient to establish a legal duty. While a violation of a statute may create a rebuttal presumption of negligence²⁵, violations of rules and regulations issued under statutory authority

²⁰ See, *id.* at 172, where our Supreme Court remanded the case to the trial court to determine if the injured plaintiff was owed a common-law duty by a subcontractor at the construction site.

²¹ *Latham v Barton Malow Co*, 480 Mich 105, 112; 746 NW2d 868 (2008).

²² *Woods*, 277 Mich App at 629.

²³ *Id.* at 630.

²⁴ *Al-Maliki v LaGrant*, 286 Mich App 483, 486; 781 NW2d 853 (2009).

²⁵ *Johnson v Bobbie's Party Store*, 189 Mich App 652, 661; 473 NW2d 796 (1991).

are merely evidence of negligence.²⁶ The SSCCA does not create statutory duties. The SSCCA only establishes the authority for promulgating and preparing the state construction code.²⁷ The existence of a city ordinance would not support a different result because, “although violation of an ordinance may be some evidence of negligence, it is not itself sufficient to impose a legal duty cognizable in negligence.”²⁸

Because the SSCCA does not establish a legal duty owed by GHI to the minor children, but only establishes the authority for promulgating and preparing the state construction code, the trial court did not abuse its discretion in denying LaHood-Sarkis’ motion for reconsideration on this ground. Likewise, the trial court did not abuse its discretion in denying LaHood-Sarkis’ request to amend the complaint to add allegations regarding code violations, because any amendment would be futile.²⁹

IV. THIRD-PARTY BENEFICIARIES

LaHood-Sarkis next argues that the trial court erred by denying his request to amend his complaint to allege the children’s status as third-party beneficiaries of the residential construction contract. We review the trial court’s decisions for an abuse of discretion.³⁰ Issues involving contract interpretation present questions of law that we review de novo.³¹

For the children to qualify as third-party beneficiaries of the construction contract, LaHood-Sarkis must demonstrate that GHI undertook an obligation directly for their benefit.³² An objective standard is applied to determine if a person is a third-party beneficiary by examining the language of the contract.³³

LaHood-Sarkis relies on language in the construction contract providing that “[t]his agreement shall bind and benefit the parties and their successors, heirs, representatives, and permitted assigns.” This type of language recognizes the rights of parties to assign their respective interests in contracts.³⁴ An assignee acquires the assignor’s rights and stands in the

²⁶ *Douglas v Edgewater Park Co*, 369 Mich 320, 328; 119 NW2d 567 (1963); see also *Zeni v Anderson*, 397 Mich 117, 142; 243 NW2d 270 (1976).

²⁷ *Rakowski v Sarb*, 269 Mich App 619, 628 n 4; 713 NW2d 787 (2006).

²⁸ *Summers v Detroit*, 206 Mich App 46, 52; 520 NW2d 356 (1994).

²⁹ *Ormsby*, 471 Mich at 52-53.

³⁰ *Ormsby*, 471 Mich at 53.

³¹ *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006).

³² MCL 600.1405(1); *Shay v Aldrich*, 487 Mich 648, 663; 790 NW2d 629 (2010).

³³ *Id.*

³⁴ See *Range v Davison*, 242 Mich 73, 80; 218 NW 789 (1928).

shoes of the assignor.³⁵ But the failure to recognize a right of assignment or some other form of transfer of rights does not necessarily preclude an individual or entity from standing in the shoes of the contracting party. Absent express words to the contrary, the law presumes that the parties intend to bind themselves and their personal representatives.³⁶ “[T]his presumption extends not only to the obligation of contractual performance but the corresponding right to receive the consideration therefor, where not personal in nature.”³⁷ These principles reflect that a promisee’s rights do not die with the death of a contracting party.³⁸

LaHood-Sarkis’ argument that the “bind and benefit” language is an indication that the minor children are intended third-party beneficiaries of the contract is without merit. “It goes without saying that a contract cannot bind a nonparty.”³⁹ It is clear from the use of the conjunctive “and” in the contract phrase that some event must occur outside the contract that is sufficient to bind a person before he or she may fall within the class of successors, heirs, executors, administrators, and assigns who are bound and benefited by the contract.

We also find no merit to LaHood-Sarkis’ argument that the children could be viewed as falling within the “heir” class in the “bind and benefit” clause solely because of their relationship with the LaHoods. The word “heir” is often used synonymously with “children,” but has “a technical legal meaning” that describes those in succession to a decedent’s property.⁴⁰ In the technical sense, “a living person has no heirs.”⁴¹ The definition of “heir” in the Estates and Protected Individuals Code⁴² does not support a different result.

It is well-settled that a contract is construed in its entirety.⁴³ An unambiguous contract is enforced as written.⁴⁴ The “bind and benefit” provision in the residential construction contract does not confer third-party beneficiary status on any class, but rather rests on other doctrines that permit an individual or entity to stand in the shoes of the contracting party. Because it is clear that GHI did not undertake any contractual obligation directly for the minor children, the trial court correctly determined that the children are not third-party beneficiaries of the residential construction contract. Accordingly, the court did not abuse its discretion in denying LaHood-

³⁵ *Prof Rehab Assoc v State Farm Mut Auto Ins Co*, 228 Mich App 167, 177; 577 NW2d 909 (1998).

³⁶ *In re Traub Estate*, 354 Mich 263, 279; 92 NW2d 480 (1958).

³⁷ *Id.* at 279.

³⁸ *Id.* at 283.

³⁹ *EEOC v Waffle House, Inc.*, 534 US 279, 294; 122 S Ct 754; 151 L Ed 2d 755 (2002).

⁴⁰ *Fullager v Stockdale*, 138 Mich 363, 367; 101 NW 576 (1904).

⁴¹ *Id.*; see also *Lloyd v Wayne Circuit Judge*, 56 Mich 236, 240; 23 NW 28 (1885).

⁴² MCL 700.1104(n).

⁴³ *Perry v Sied*, 461 Mich 680, 689; 611 NW2d 516 (2000).

⁴⁴ *Coates v Bastian Bros, Inc.*, 276 Mich App 498, 503; 741 NW2d 539 (2007).

Sarkis' motion to amend the complaint to set forth a warranty or negligence claim based on the children's alleged status as third-party beneficiaries.

V. FRAUDULENT MISREPRESENTATIONS

LaHood-Sarkis also challenges the trial court's grant of summary disposition in favor of GHI and the Gardellas with respect to the claim of fraudulent misrepresentations. LaHood-Sarkis argues that he should have been permitted to proceed on the basis that the minor children were victims of fraud perpetrated by GHI and the Gardellas against the LaHoods. We disagree.

A fraud claim must be "stated with particularity" in a complaint.⁴⁵ Mere conclusions, unsupported by factual allegations, are insufficient to state a cause of action.⁴⁶ A material component of a fraud claim concerns who the defendant intended to influence through misrepresentations.⁴⁷ "[W]here a party makes false representations to another with the intent or knowledge that they be exhibited or repeated to a third party for the purpose of deceiving him, that third party can maintain a tort action against the party making the false statements for the damages resulting from the fraud."⁴⁸

LaHood-Sarkis did not plead that GHI and the Gardellas intended to use the LaHoods as conduits to influence the minor children, but rather that they made representations with the intent to deceive and defraud the LaHoods. LaHood-Sarkis then alleged that "the LaHoods and the Minor[s] would act and rely upon their representations; namely, that they would continue to pay the monies owed under the Note and continue to live in the home if they were told it was safe and habitable." Construed in light of more particularized allegations concerning GHI's relationship with the LaHoods, the allegations are insufficient to state a cause of action for fraudulent misrepresentation because they are based on the alleged intent of GHI and the Gardellas to influence the LaHoods, not their children.⁴⁹ The trial court did not err in dismissing the fraud claims and did not abuse its discretion in denying LaHood-Sarkis' request to amend the

⁴⁵ MCR 2.112(B)(1).

⁴⁶ *Eason v Coggins Mem Christian Methodist Episcopal Church*, 210 Mich App 261, 263; 532 NW2d 882 (1995).

⁴⁷ *Greenville Nat'l Bank v Nat'l Hardwood Co*, 241 Mich 524, 526-527; 217 NW 786 (1928).

⁴⁸ *Cormack v American Underwriters Corp*, 94 Mich App 379, 386; 288 NW2d 634 (1979).

⁴⁹ We note that LaHood-Sarkis relies on an unpublished opinion of this Court, which is not precedentially binding. MCR 7.212(C)(1).

complaint to further allege a claim for fraud as LaHood-Sarkis failed to identify any nonfutile basis for an amendment.⁵⁰

Affirmed.

/s/ William B. Murphy
/s/ Michael J. Talbot
/s/ Christopher M. Murray

⁵⁰ *Ormsby*, 471 Mich at 52-53.